BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

MICHELLE E. GRAMKE	)	
Claimant	)	
VS.	)	
	)	Docket No. 187,962
GTEL ENVIRONMENTAL LABS, INC.	)	
Respondent	)	
AND	)	
	)	
NATIONAL UNION FIRE INS. CO. OF NY	)	
Insurance Carrier	)	
AND	)	
	)	
WORKERS COMPENSATION FUND	)	

ORDER

Claimant requested review of the Awards dated May 16, 1995, and October 11, 1996, entered respectively by Administrative Law Judges Shannon S. Krysl and Jon L. Frobish. On April 1, 1997, the Appeals Board heard oral argument.

APPEARANCES

Steven L. Foulston of Wichita, Kansas, appeared for the claimant. Gary A. Winfrey of Wichita, Kansas, appeared for the respondent and its insurance carrier. Chris S. Cole of Wichita, Kansas, appeared for the Workers Compensation Fund.

RECORD AND STIPULATIONS

The record and the parties' stipulations are listed in the Awards. Also, pursuant to stipulation, the record includes claimant's unemployment compensation records and the agreement regarding Fund liability. In addition, the record includes the regular hearing testimony taken on April 25, 1995.

ISSUES

This is the second time the Appeals Board has reviewed a final award entered in this proceeding. The first award was entered on May 16, 1995. Because the Administrative Law Judge, upon the Judge's own initiative and without notice to the parties, sought and obtained a portion of claimant's unemployment file after the claim had been submitted for decision, the Appeals Board remanded the proceeding to the Judge to consider all of the unemployment compensation documents that the parties stipulated into the record. Upon remand, the Director's office assigned the case to Administrative Law Judge Frobish who, after considering the entire record, awarded claimant a 12.5 percent permanent partial general disability for a whole body functional impairment.

Kansas law requires workers to attempt an accommodated job offered by the employer that pays a comparable wage. Also, the law requires workers to make a good faith effort to find appropriate employment after recovering from their injuries. Claimant returned to work for respondent after undergoing bilateral carpal tunnel releases and worked until she terminated because she felt she could no longer continue to perform her duties. Should claimant's permanent partial disability benefits be limited to her whole body functional impairment rating because she voluntarily quit her job?

FINDINGS OF FACT

After reviewing the entire record, the Appeals Board finds as follows:

(1) Claimant developed bilateral carpal tunnel syndrome while working for the respondent as a receptionist, accounts payable clerk, and a customer service representative, a job that required her to work with a keyboard. The parties stipulated that claimant sustained personal injury by accident arising out of and in the course of her employment with respondent during the period from August 1993 through her last day of work for the respondent on October 14, 1994.

(2) After a period of conservative treatment, claimant underwent right carpal tunnel release surgery on April 25, 1994, and a left carpal tunnel release on May 9, 1994. The parties stipulated claimant has a 12.5 percent whole body functional impairment as a result of her injury.

(3) Claimant immediately returned to work to a modified job two days after the right wrist surgery. She answered the telephone and handled E-mail. Claimant returned to work the day following the left arm surgery to the same modified job.

(4) In July 1994, claimant's surgeon, board certified orthopedist and hand specialist J. Mark Melhorn, M.D., released claimant with permanent medical restrictions. He recommended light work and no lifting greater than 20 pounds occasionally and 10 pounds frequently, limit answering the telephone once every 15 minutes, and frequent task rotation. He believes claimant may perform keyboarding 45 minutes each hour with task rotation.

The doctor advised claimant to return if her work aggravated her symptoms. The claimant never returned.

(5) At her attorney's request, claimant saw general practitioner Ernest R. Schlachter, M.D., in both June 1994 and September 1994 for evaluation. This doctor diagnosed bilateral overuse syndrome and early recurrence of carpal tunnel syndrome. He also recommended certain work restrictions and limitations:

> She should be on permanent restrictions of no repetitive pushing, pulling, twisting or grasping motions with either arm or hand. She should avoid repetitively lifting more than ten pounds with either arm or hand or single lifts more than fifteen pounds with either arm or hand. She also should avoid vibratory tools and cold environments.

(6) During the June 1994 examination, claimant told Dr. Schlachter she was working as a receptionist and accounts payable clerk and spending four to five hours per day on a keyboard. At that examination, the doctor recommended claimant pursue a different occupation that did not require repetitive hand activities. At the September 1994 examination, the doctor told claimant to quit her job with respondent because the work violated her work restrictions.

(7) Respondent accommodated claimant's injuries by providing a telephone headset that eliminated the need to constantly or repetitively grasp the telephone receiver to answer or transfer calls. Also, the respondent provided an articulating keyboard tray that claimant could adjust to place her wrists in a neutral position while entering computer data.

(8) Based upon the testimony of Jim Helzer, respondent's health and safety coordinator, Karen Welliver, and Debra Salkil, the Appeals Board finds that the job duties that claimant performed after recuperating from her surgeries were within the permanent work restrictions provided by both Drs. Melhorn and Schlachter. The headset and adjustable keyboard tray helped reduce repetitive, forceful, hand activities. Moreover, the job itself required much task rotation and allowed one to pace work activities. The Appeals Board is mindful of the testimony that the job videotaped by Mr. Helzer did not adequately represent claimant's job because there were many more telephone interruptions. The Appeals Board, however, finds that the telephone interruptions would be beneficial and comply with claimant's restrictions as answering the telephone did not require repetitive hand movement as a call could be answered or transferred by the touch of a button and the interruptions compelled needed task rotation.

(9) Before terminating her employment with respondent, claimant did not discuss with either her supervisors or the health and safety coordinator the need for other accommodations.

(10) Claimant's last day of work for respondent was October 14, 1994. When she terminated, claimant was earning a wage comparable to what she was earning when injured, which the parties stipulated to be $347.75.

(11) When claimant last testified at her deposition in May 1995, she had not worked anywhere since leaving respondent's employ. But she had looked for work in connection with her unemployment benefits claim, which she filed after terminating her job.

(12) The respondent, its insurance carrier, and the Workers Compensation Fund stipulated that the Fund would be liable for 50 percent of the temporary total, permanent partial, medical benefits, and court costs associated with this proceeding.

(13) The Appeals Board adopts the findings set forth in the May 16, 1995, Award to the extent they are not inconsistent with the above.

CONCLUSIONS OF LAW

Because hers is an "unscheduled" injury with a stipulated period of accident from August 1993 through October 14, 1994, K.S.A. 44-510e governs the computation of permanent partial general disability benefits:

> The extent of permanent partial general disability shall be the extent, expressed as a percentage, to which the employee, in the opinion of the physician, has lost the ability to perform the work tasks that the employee performed in any substantial gainful employment during the fifteen-year period preceding the accident, averaged together with the difference between the average weekly wage the worker was earning at the time of the injury and the average weekly wage the worker is earning after the injury. In any event, the extent of permanent partial general disability shall not be less than the percentage of functional impairment. Functional impairment means the extent, expressed as a percentage, of the loss of a portion of the total physiological capabilities of the human body as established by competent medical evidence and based on the third edition, revised, of the American Medical Association Guidelines for the Evaluation of Physical Impairment, if the impairment is contained therein. An employee shall not be entitled to receive permanent partial general disability compensation in excess of the percentage of functional impairment as long as the employee is engaging in any work for wages equal to 90% or more of the average gross weekly wage that the employee was earning at the time of the injury.

The above statute must also be applied in light of Foulk v. Colonial Terrace, 20 Kan. App. 2d 277, 887 P.2d 140 (1994), *rev. denied* 257 Kan. 1091 (1995), and Copeland v. Johnson Group, Inc., 24 Kan. App. 2d 306, 944 P.2d 179 (1997).

The Foulk Court held that a worker must attempt to perform an accommodated job that was offered by the employer and paid a comparable wage. The Copeland Court held that a worker must make a good faith effort to find appropriate employment before the actual difference between pre- and post-injury wages could be used in the permanent partial general disability formula.

When considering the entire record, the Appeals Board finds claimant voluntarily left an accommodated job provided by the respondent that paid a comparable wage and that was within her permanent work restrictions and limitations. Therefore, the principles set forth in Foulk are applicable and claimant is limited to permanent partial general disability benefits for her 12.5 percent whole body functional impairment rating.

The Awards dated May 16, 1995, and October 11, 1996, should be affirmed.

AWARD

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Awards dated May 16, 1995, and October 11, 1996, entered by Administrative Law Judges Shannon S. Krysl and Jon L. Frobish, respectively, should be, and hereby are, affirmed.

IT IS SO ORDERED.

Dated this _____ day of March 1998.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Steven L. Foulston, Wichita, KS
Gary A. Winfrey, Wichita, KS
Chris S. Cole, Wichita, KS
Jon L. Frobish, Administrative Law Judge
Philip S. Harness, Director